Supreme Court, U. S.
FILED
DEC 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5176 (consolidated with No. 74-5175)

DANIEL EDWARD HENRY, JOHN THOMAS KIRBY, KENNETH WAYNE McLEAN, DAVID ALAN HAECKER, A.C. JACKSON, AUBRY DUGLASS MIMS, and STEPHEN L. BRAY, II and MICHAEL A. NESS, Intervenors, Individually and on behalf of all persons similarly situated,

Petitioners,

v.

HONORABLE J. WILLIAM MIDDENDORF, II, Individually and in his capacity as Secretary of the Navy; ADMIRAL JAMES L. HOLLOWAY, III, U.S. Navy, Individually and in his capacity as Chief of Naval Operations; GENERAL ROBERT E. CUSHMAN, U.S. Marine Corps, Individually and in his capacity as Commandant, U.S. Marine Corps; BRIGADIER-GENERAL R.W. TAYLOR, U.S. Marine Corps, Individually and in his capacity as Commander, Marine Corps Air Station, El Toro, Santa Ana, California; and MAJOR GENERAL WILLIAM R. QUINN, U.S. Marine Corps, Individually and in his capacity as Commander, Third Marine Aircraft Wing, Marine Corps Air Station, El Toro, Santa Ana, California,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

NATHAN R. ZAHM
4422 Sherman Oaks Circle
Sherman Oaks, California 91403

A.L. WIRIN and FRED OKRAND
ACLU Foundation of Southern California
633 South Shatto Place
Los Angeles, California 90005

Attorneys for Petitioners

Of Counsel:

DAVID F. ADDLESTONE

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

A motion to proceed on the original record was made and granted. There is, therefore, no printed appendix in this case.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED	2
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	8
ARGUMENT:	
I. THE SIXTH AMENDMENT'S PROVISION FOR ASSISTANCE OF COUNSEL APPLIES TO THE ACCUSED IN ALL SUMMARY COURTS-MARTIAL	11
A. It is not expressly or by necessary implication inapplicable to military trials	11
B. Military necessity does not render the constitutional right inapplicable	16
C. There is historical support for application of the constitutional right to courts-martial	18
D. Disputed historical documentation cannot be controlling in constitutional interpretation	20
E. Modern realities must be considered in constitutional interpretation	21
II. *GIDEON'S* AND *ARGERSINGER'S* ABSOLUTE STANDARD OF DUE PROCESS OF LAW REQUIRES ASSISTANCE OF COUNSEL IN SUMMARY COURTS-MARTIAL	25

Page

A. Summary courts-martial are criminal prosecutions by legislative and judicial definition 25

B. Consequences of summary courts-martial can be "grave" 30

C. Military personnel are no better equipped than civilians to defend themselves at trial 31

D. Due process requires that a judge not serve also as prosecutor 33

E. District court opinion allows for military exigencies 34

F. Absolute right to counsel required under due process 34

III. THE DISTRICT COURT'S JURISDICTION EXTENDED TO RESPONDENTS BEYOND ITS TERRITORIAL LIMITS UNDER THE MANDAMUS AND HABEAS CORPUS STATUTES AND COMPLIANCE WITH PROVISIONS OF 28 U.S.C. 1391(e) 36

A. Top military authorities are "custodians" for purposes of habeas corpus 36

CONCLUSION 43

APPENDIX "A" (Manual for Courts-Martial, 1969 (Rev.), Par. 79) 1a

TABLE OF AUTHORITIES

Cases:

Application of Stapley, 246 F.Supp. 316 (1965) 14

Altmayer v. Laird, 148 F.2d 161 (1945) 14

Angle v. Laird, 429 F.2d 892 (1970) 14

Argersinger v. Hamlin, 407 U.S. 25 (1972) ..... *passim*

Page

Betonie v. Sizemore, 496 F.2d 1001 (1974) ..... *passim*

Betts v. Brady, 316 U.S. 455 (1942) 34

Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973) 42

Brown v. Board of Education, 347 U.S. 483 (1954) 21

Burns v. Wilson, 346 U.S. 844 (1953) 9, 12, 13, 25

Burns v. Wilson, 346 U.S. 844 42

Daigle v. Warner, 490 F.2d 358 (1973) ..... *passim*

Daigle v. Warner, 348 F.Supp. 1074 (1972) 34, 37

Denton v. United States, 144 Ct. Cl. 840 (1959) 14

Douglas v. California, 372 U.S. 353 (1963) 16

Dr. Bonham's Case, 8 Co.Rep. 114(a), 77 Eng. Rep. 647 (1610) 33

Eisentrager v. Forrestal, 174 F.2d 961 (1949) 42

Ex parte Milligan, 71 U.S. 2 (1866) 13

Ex parte Richard Quirin, 317 U.S. 1 (1942) 13

Ex parte Schollenberger, 96 U.S. 369 (1877) 36

Gallagher v. United States, 191 Ct. Cl. 546 (1970) 14

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 26, 27

Gideon v. Wainwright, 372 U.S. 335 (1963) 26, 34

Gompers v. United States, 233 U.S. 604 (1914) 29

Harris v. Ciccone, 417 F.2d 479 (1969) 14

Harris v. Nelson, 394 U.S. 286 (1969) 41

Henry v. Warner, 357 F.Supp. 495 (1973) 1, 17, 34, 37, 38, 40, 42

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) 23

Industrial Addition Ass'n v. Co. of Internal Revenue, 323 U.S. 310 (1945) 36

Jones v. Cunningham, 371 U.S. 236 (1963) 39

Page

Kennedy v. Commandant, 377 F.2d 339 (1967) 14, 32

McCulloch v. Maryland, 4 Wheat. 316 (1819) 24

Mempa v. Rhay, 389 U.S. 128 (1967) 23, 35

Mercelis v. Wilson, 235 U.S. 579 (1915) 36

Miller v. Laird, 464 F.2d 533 (1972) 40

Minnesota v. Hitchcock, 185 U.S. 373 (1901) 36

Missouri v. Holland, 252 U.S. 416 (1920) 24

Noyd v. Bond, 395 U.S. 683 (1969) 15

Oregon v. Mitchell, 400 U.S. 112 (1970) 20, 22

Parisi v. Davidson, 405 U.S. 34 (1972) 27

Parker v. Levy, 94 S.Ct. 2547 (1974) 12

Reid v. United States, 211 U.S. 529 (1908) 36

Robb v. United States, 456 F.2d 768 (1972) 15

Romero v. Squier, 133 F.2d 528 (1943) 14

Schlanger v. Seamans, 401 U.S. 487 (1971) 40

Shapiro v. United States, 107 Ct. Cl. 650 (1947) 14

Shaughnessy v. Pedreiro, 349 U.S. 49 (1955) 39

Smith v. Campbell, 450 F.2d 829 (1971) 39, 40, 42

Smith v. Hiatt, 170 F.2d 61 (1948) 14

Smith v. McNamara, 395 F.2d 61 (1968) 14

Strait v. Laird, 406 U.S. 341 (1972) 42

Tumey v. Ohio, 273 U.S. 510 (1927) 33

United States v. Alderman, 22 USCMA 298, 46 CMR 298 (1973) ..... *passim*

United States v. Armbruster, 11 USCMA 596, 29 CMR 412 (1960) 12, 17

United States v. Cruse, 22 USCMA 324 (1973) 14

United States v. Culp, 14 USCMA 199, 33 CMR 411 (1963) 13, 15, 19

Page

United States v. Ferry, 22 USCMA 339 (1973) 14

United States v. Henry, 22 USCMA 328 (1973) 14

United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960) 13, 15

United States v. Kazmierczak, 16 USCMA 594, 37 CMR 214 (1967) 24

United States v. Ross, 22 USCMA 353 (1973) 14

United States v. Seda, 22 USCMA 341 (1973) 14

United States v. Shamel, 22 USCMA 361 (1973) ... 14, 28, 29

United States ex rel. Meadows v. State of New York, 426 F.2d 1176 (1970) 42

United States v. Sutton, 3 USCMA 220, 11 CMR 220 (1953) 13

United States v. Tempia, 16 USCMA 629, 37 CMR 249 (1967) 12, 15

United States v. Wade, 388 U.S. 218 (1966) 22

United States ex rel. Armstrong v. Wheeler, 321 F.Supp. 471 (1970) 41

Ward v. Monroeville, 409 U.S. 57 (1972) 33

Webb v. Beto, 362 F.2d 105 (1966) 42

Williams v. Fanning, 332 U.S. 490 (1947) 39

Williams v. Florida, 399 U.S. 78 (1970) 22

Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) 20, 21

Constitution and statutes:

United States Constitution:

Fifth Amendment ..... *passim*

Sixth Amendment ..... *passim*

Fourteenth Amendment 20

28 U.S.C. 1254 (1) 2

28 U.S.C. 1361 ..... 7, 37, 41

Page

28 U.S.C. 1391(e) 5, 10, 36, 37, 38, 40, 41

28 U.S.C. 2241 ..... 7, 37

Uniform Code of Military Justice:
10 U.S.C. 815 (Art. 15) 28, 29
10 U.S.C. 816 (Art. 16) 3
10 U.S.C. 820 (Art. 20) 3

Miscellaneous:

Congressional Record:
Senate Report No. 1911, Vol. 108 (Part 6) 29
Senate Report No. 1992, 87th Cong.2d Sess. (1962) 41

Federal Rules of Civil Procedure, Rule 23(b)(3) and (c) 7
Rule 81(a)(2) 41

Manual for Courts-Martial, 1969 (Rev.)
Par. 79 ..... 4, 1a
Par. 8, 18(b)(1) 137 28
Par. 16(b), 126(c)(3) and (e) 30
Par. 127(c) 27, 28
Par. 137 31

Secretary of the Navy Message No. 082237Z/52, June 8, 1973 17

Other Authorities:

Fidell, The Summary Court-Martial: A Proposal, 8 Harv. Law Journal on Legislation 571 (1971) 31

Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L.R. 293 (1957) 18

Miller, A Long Look at Article 15, 28 Mil. L.R. 37 (1965) 29

Note, An Historical Argument For the Right To Counsel During Police Interrogation, 73 Yale L.J. 1000 (1964) 35

Page

tenBroek, Use By The United States Supreme Court of Extrinsic Aids in Constitutional Construction, 26 & 27 Calif. L. R. (1938 & 1939) 20

Warren, The Bill of Rights And The Military, 37 N.Y.U. L.R. 181 (1961) 23

Wiener, Courts Martial and the Bill of Rights: The Original Practice I, 72 Harv. L. R. 1 (1958) 18, 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5176 (consolidated with No. 74-175)

DANIEL EDWARD HENRY, JOHN THOMAS KIRBY, KENNETH WAYNE McLEAN, DAVID ALAN HAECKER, A.C. JACKSON, AUBRY DUGLASS MIMS, and STEPHEN L. BRAY, II and MICHAEL A. NESS, Intervenors, Individually and on behalf of all persons similarly situated,

Petitioners,

v.

HONORABLE J. WILLIAM MIDDENDORF, II, Individually and in his capacity as Secretary of the Navy; ADMIRAL JAMES L. HOLLOWAY, III, U.S. Navy, Individually and in his capacity as Chief of Naval Operations; GENERAL ROBERT E. CUSHMAN, U.S. Marine Corps, Individually and in his capacity as Commandant, U.S. Marine Corps; BRIGADIER-GENERAL R.W. TAYLOR, U.S. Marine Corps, Individually and in his capacity as Commander, Marine Corps Air Station, El Toro, Santa Ana, California; and MAJOR GENERAL WILLIAM R. QUINN, U.S. Marine Corps, Individually and in his capacity as Commander, Third Marine Aircraft Wing, Marine Corps Air Station, El Toro, Santa Ana, California,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California is reported in 357 F.

Supp. 495 (1973), and is set out in App. C., Pet. for Cert., Case No. 74-175, p. 4a. The United States Court of Appeals for the Ninth Circuit rendered no opinion in connection with its order other than a notation. A copy of said order is presented in App. A., Pet. for Cert., Case No. 74-175, p. 1a.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit was entered on March 27, 1974. Its order denying a Petition for Rehearing and rejecting the suggestion for a rehearing en banc was entered on May 23, 1974. A copy of said order is presented in App. B., Pet. for Cert., Case No. 74-175, p. 3a. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of war or public danger; . . . nor be deprived of life, liberty, or property, without due process of law; . . ."

Article 20 of the Uniform Code of Military Justice (10 U.S.C. 820) provides:

"Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay."

Article 16 of the Uniform Code of Military Justice (10 U.S.C. 816) provides:

"The three kinds of courts-martial in each of the armed forces are–

(1) general courts-martial consisting of–

(a) a military judge and not less than five members; or

(b) only a military judge if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of–

(a) not less than three members; or

(b) a military judge and not less than three members; or

(c) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(b) so requests; and

(3) summary courts-martial, consisting of one commissioned officer."

Paragraph 79 of the *Manual for Courts-Martial*, 1969 (rev.), constitutes the regulation on Summary Courts-Martial prescribed by the President as authorized by Article 36 of the Uniform Code of Military Justice (10 U.S.C. 836). Provisions of that regulation are set out in full in Appendix A, infra, p. 1a.

QUESTIONS PRESENTED

1. Whether the Sixth Amendment's guarantee of assistance of counsel in criminal prosecutions, as interpreted and applied in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), is applicable to trials before summary courts-martial.

2. Whether the Fifth Amendment's guarantee of due process of law requires the military services to appoint

counsel, who does not represent the prosecution, to assist the accused in every trial before a summary court-martial in which a sentence of confinement is imposed.

3. Whether a federal district court may extend the scope of its mandamus order beyond its territorial limits under the provisions of 28 U.S.C. 1391(e).

4. Whether a federal district court may extend the scope of its writ of habeas corpus beyond its territorial limits under the provisions of 28 U.S.C. 1391(e).

STATEMENT OF THE CASE

The facts relevant to the questions presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary manner.

Petitioners were members of the United States Marine Corps (U.S. Navy) who had been charged with minor offenses which constitute violations of the Uniform Code of Military Justice, 10 U.S.C. Section 801 et seq. Petitioners HENRY, KIRBY, McLEAN, BRAY and NESS were charged with "unauthorized absence"; Petitioner McLEAN was also charged with "misbehavior of sentry on post" and "disrespect to a noncommissioned officer." Each of them was convicted by a summary court-martial at which he was not represented by his own counsel and was sentenced to confinement at hard labor for 30 days, except NESS, who was so sentenced for 27 days. Petitioners HAECKER, JACKSON and MIMS were all charged with various similar infractions and ordered to stand trial at

summary court-martial at which they had been informed no legal counsel would be provided.

Upon request in chambers by the district court to Respondents-Defendants, (who, except for CUSHMAN, were individuals who have been succeeded in office by the respective respondents named herein), no summary court-martial was conducted with respect to charges against Petitioners HAECKER, JACKSON and MIMS prior to issuance of judgment in the action.

A verified petition for a Writ of Habeas Corpus of Petitioners HENRY, KIRBY and McLEAN, individually and on behalf of all persons similarly situated, together with the Complaint of said Petitioners and of Petitioners HAECKER, JACKSON and MIMS, individually and on behalf of all persons similarly situated, for injunctive, mandamus, and declaratory relief, and motions for a temporary restraining order and preliminary injunction, order designating action as a class action, and order allowing Petitioner-Plaintiffs to proceed *in forma pauperis*, were filed on February 16, 1973, in the district court. (R.1)

Later the district court permitted BRAY and NESS to intervene as Petitioners, ordered issuance of a Writ of Habeas Corpus as to KIRBY, BRAY and NESS and their immediate release from confinement pending further order of court with regard to their respective convictions and sentencing by summary courts-martial; and ordered Respondent-Defendants to refrain from conducting any summary courts-martial within the territorial jurisdiction of the court without affording the accused the assistance of counsel, where such proceeding might result in confinement of the accused, pending further order of court. (R. 182)

The district court also ordered that the Petitioner-Plaintiffs and Intervenors, each and all, be allowed to proceed *in forma pauperis.* (R. 255)

Following hearing, the district court filed and entered its Memorandum Opinion in the action on April 13, 1973 (R. 252) and its Judgment on April 17, 1973 (R. 268), granting Petitioners relief as a class pursuant to Rule 23(b)(3) and (c) of Federal Rules of Civil Procedure, in the form of habeas corpus pursuant to 28 U.S.C. 2241 et seq., and in the nature of mandamus pursuant to 28 U.S.C. 1361. The writ of habeas corpus was granted specifically on behalf of Petitioners HENRY and McLEAN in addition to that previously granted on behalf of the other named Petitioners, and on behalf of every member of the designated class.

The judgment ordered Respondents-Defendants to release said Petitioners and said class members from confinement and to direct their agents to insure that no summary courts-martial be conducted by the Navy or Marine Corps anywhere in the world unless and until the constitutional requirements of *Argersinger v. Hamlin,* supra, as specified in the order, are satisfied.

Finding that Navy regulations do not permit retrial of summary courts-martial, the district court ordered the findings of guilty and the sentences of Petitioners HENRY, KIRBY, McLEAN, BRAY and NESS vacated and their service records expunged of any reference thereto.

Respondents-Defendants appealed said judgment to the United States Court of Appeals for the Ninth Circuit. (R. 272 and 274) The latter on March 27, 1974, in an Order which it designated to be published, and "under the compulsion" of that Court's opinion in

Daigle v. Warner, 490 F.2d 358 (9th Cir. 1973). (App. G, Pet. for Cert., Case No. 74-175, p. 26a) ordered the orders and judgment of the district court vacated and the cause remanded to the district court for reconsideration in the light of *Daigle*. That Order also stated that two of the members of the three-judge panel that issued said Order "disagree with the holding of *Daigle*" and that "All members of this panel, however, follow *Daigle* because it is the law of this circuit". (App. A, Pet. for Cert., Case No. 74-175, p. 1a).

Petitioners' Petition for Rehearing and suggestion for a rehearing en banc was rejected by an Order filed and entered on May 23, 1974. (App. B, Pet. for Cert., Case No. 74-175, p. 3a).

Hearing on filing and spreading the judgment of the Court of Appeals in the district court has been continued by that court to a date unspecified following disposition of this case by this Court.

SUMMARY OF ARGUMENT

1. A United States military authority which confines, or acts on the premise that it may confine military personnel for any period of time under sentence of summary court-martial conviction resulting from trial at which the accused, as an indigent, was not, or will not be, provided assistance of counsel, violates the Sixth Amendment's provision for assistance of counsel and the Fifth Amendment's guarantee of due process of law, as interpreted and applied by this Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

2. That military personnel retain constitutional rights which must be protected by military courts has not

been controverted since this Court's decision in *Burns v. Wilson*, 346 U.S. 137 (1953); correspondingly, the United States Court of Military Appeals, which is the "Military Supreme Court", holds that the protections in the Bill of Rights, "except those which are expressly or by necessary implication inapplicable", are available to military personnel.

3. Historical data supports the view that the framers of the Sixth Amendment intended its guarantee of assistance of counsel to apply to courts-martial, particularly as *no* exception of "cases arising in the land or naval forces, or in the Militia" was written into the Sixth as was provided in the Fifth Amendment's requirement for a presentment or indictment of a Grand Jury. Thus, since this Court's decision in *Argersinger*, the United States Court of Military Appeals and the United States Court of Appeals for the Fifth Circuit have held not merely that the Sixth Amendment's right to counsel provision applies to courts-martial, but specifically to summary courts-martial. That view is supported by this Court's holdings that seek to preserve maximum constitutional rights for men in service.

4. Military necessity for maintaining discipline does not render inapplicable to military personnel the constitutional guarantee of assistance of counsel, whether its source be the Sixth Amendment or the Fifth Amendment's due process of law clause.

5. It is uncontroverted that the Fifth Amendment affords due process of law to the accused at trial before courts-martial. This court in *Argersinger* extended the due process requirement of assistance to counsel to criminal prosecutions in which imprisonment is

imposed, regardless of the degree of seriousness of the offense. As summary courts-martial are criminal prosecutions in which an accused may be sentenced to confinement, the *Argersinger* determination as to the Fifth Amendment's due process requirement for assistance of counsel has been held to apply to summary courts-martial without limitations by the United States Court of Military Appeals and by the United States Court of Appeals for the Fifth Circuit. That view should be affirmed by this Court, even if the Sixth Amendment provision for assistance of counsel is found not to be applicable to the military.

6. Where, as here, in personam jurisdiction has been acquired and venue requirements satisfied by service of process in accordance with the provisions of 28 U.S.C. Section 1391(e), a district court's judgment and orders in the nature of mandamus and writ of habeas corpus are jurisdictionally effective as directed to Respondents-Defendants who reside outside the territorial jurisdiction of the court and are custodians of the Petitioners, including those who as members of a class are confined outside the court's territorial jurisdiction. A military "custodian" for purposes of habeas corpus may be any official or officer who has directive power over the immediate jailer.

ARGUMENT

I.

THE SIXTH AMENDMENT'S PROVISION FOR ASSISTANCE OF COUNSEL APPLIES TO THE ACCUSED IN ALL SUMMARY COURTS-MARTIAL.

A. It is not expressly or by necessary implication inapplicable to military trials.

The panel of judges of the Ninth Circuit Court of Appeals which decided the instant case without an opinion did so "(U)nder the compulsion of" a preceding panel's opinion in *Daigle v. Warner*, 490 F.2d 358 (1973), with the holding of which two of the three members of the instant panel disagree. A petition for a writ of certiorari by the appellees in *Daigle* (sub. nom. *Crosby, et al. v. Warner*, No. 73-6642) is still pending before this Court.

In order to support the prayer of Petitioners that the appellate court's order herein should be vacated and the judgment and orders of the district court should be affirmed by this Court, it is therefore necessary to present argument with regard specifically to the holding of the Ninth Circuit in *Daigle*. It is thus a denial of the validity of the holding in *Daigle*, and affirmation of contrary holdings by other federal appellate courts, that Petitioners seek from this Court, and to which argument here is directed.

Specifically, Petitioners contend, contrary to the holding in *Daigle*, that the Sixth Amendment guarantee of assistance of counsel applies to summary courts-martial, and that the Fifth Amendment's due process of

law clause, as interpreted by this Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), to require assistance of counsel in criminal prosecutions where imprisonment is imposed, also applies to summary courts-martial without limitations specified in *Daigle*.

This Court implicitly confirmed in *Parker v. Levy*, 94 S. Ct. 2547 (1974), the view of Chief Justice Vinson in *Burns v. Wilson*, 346 U.S. 137, 142 (1953) that "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." As stated in *United States v. Tempia*, 16 USCMA 629, 634, 37 CMR 249, 254 (1967):

> "The impact of *Burns v. Wilson*, supra, then, is of an unequivocal holding by the Supreme Court that the protections of the Constitution are available to servicemen in military trials."

In the same opinion (16 USCMA at p. 634), the United States Court of Military Appeals, recognized as the "Military Supreme Court" (*United States v. Armbruster*, 11 USCMA 596, 29 CMR 412, 414 (1960)), said:

> ". . . both the Supreme Court and this Court itself are satisfied as to the applicability of constitutional safeguards to military trials, except insofar as they are made inapplicable either expressly or by necessary implication."

Mr. Justice Douglas, dissenting in *Parker v. Levy*, supra, pointed out at p. 2566 that:

> ". . . the only express exemption of a person in the Armed Services from the protection of the Bill of Rights is that contained in the Fifth Amendment which dispenses with the need 'for a presentment

> or indictment' of a grand jury 'in cases arising in the land or naval forces . . .'."

Chief Judge Quinn of the Court of Military Appeals identified the only necessarily *implied* limitation in his dissenting opinion in *United States v. Sutton*, 3 USCMA 220, 11 CMR 220, 228 (1953) (after referring to the Fifth Amendment express exemption), as follows:

> "To this express exception may be added the implied limitation of the right of trial by jury, as protected by the Sixth Amendment, to the extent that a jury trial is required only where presentment or indictment is necessary. *Ex parte Richard Quirin*, 317 US 1, 87 L ed 3, 63 S Ct 2; *Ex Parte Milligan*, 71 US 2, 18 L ed 281. No other recognized exceptions have been cited and I know of none. The opinions of the appellate courts in the *Burns* case, supra, supports the conclusion that there are no other exceptions."

It should be noted that the dissenting opinion in *Sutton* became the majority position of the Court of Military Appeals in 1960 when that court overruled *Sutton* in *United States v. Jacoby*, 11 USCMA 428, 430-31, 29 CMR 244, holding that ". . . the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."

Accordingly, it appears that the applicability of the Sixth Amendment provision for assistance of counsel to servicemen is not expressly excepted by the Constitution and no court has held it inapplicable by necessary implication. To the contrary, the Court of Military Appeals and other federal courts have held that the right to counsel under the Sixth Amendment *is* applicable to military trials. *United States v. Culp*, 14

USCMA 199, 33 CMR 411 (1963); *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947); *Denton v. United States*, 144 Ct. Cl. 840, 863, cert. den., 361 U.S. 821 (1959); *Gallagher v. United States*, 191 Ct. Cl. 546, 423 F.2d 1371, cert. den., 400 U.S. 849 (1970); *Smith v. McNamara*, 395 F.2d 896, 899 (10th Cir. 1968), cert. den. 394 U.S. 934 (1969); *Kennedy v. Commandant*, 377 F.2d 339, 343 (10th Cir. 1967); *Application of Stapley*, 246 F. Supp. 316 (D. Utah 1965).

The following decisions, based on the issue as to whether, in view of the Sixth Amendment, counsel at courts-martial may be a non-lawyer, implicitly hold that the right to counsel provision of the Sixth Amendment applies to military courts: *Romero v. Squier*, 133 F.2d 528, 531-32 (9th Cir. 1943); cert. den. 318 U.S. 785; *Altmayer v. Sanford*, 148 F.2d 161, 162 (5th Cir. 1945); *Smith v. Hiatt*, 170 F.2d 61, 64 (3rd Cir. 1948), rev'd on other grounds, 336 U.S. 695; *Harris v. Ciccone*, 417 F.2d 479 (8th Cir. 1969); and *Angle v. Laird*, 429 F.2d 892 (10th Cir. 1970).

Most recently, both the Court of Military Appeals and the Court of Appeals for the Fifth Circuit have held specifically that the Sixth Amendment right to counsel applies to *summary* courts-martial. *United States v. Alderman*, 22 USCMA 298, 46 CMR 298 (1973); *Betonie v. Sizemore*, 496 F.2d 1001 (1974). Following *Alderman*, the Court of Military Appeals ruled similarly in other 1973 cases. See *United States v. Cruse*, 22 USCMA 324; *United States v. Henry*, 22 USCMA 328; *United States v. Ferry*, 22 USCMA 339; *United States v. Seda*, 22 USCMA 341; *United States v. Ross*, 22 USCMA 353; and *United States v. Shamel*, 22 USCMA 361.

It appears that the Ninth Circuit is the *only* federal appellate court which has reached a contrary conclusion with respect to the Sixth Amendment right to counsel, the *Daigle* opinion seemingly contravening even the Ninth Circuit view in *Romero v. Squier*, supra, and deliberately contravening the position of the "Military Supreme Court" in *Alderman, Tempia, Culp* and *Jacoby*, supra.

The suggestion stemming from this Court and Congress that the special expertise of the Court of Military Appeals should be given deference in decisions on military matters by other federal courts was made by the United States Court of Claims in *Robb v. United States*, 456 F.2d 768 (1972), which declared at p. 771:

> "We acknowledge the special competence of the Court of Military Appeals. Its expertise in administering military justice has already been explained by the Supreme Court in *Noyd v. Bond* supra, 395 U.S. at 694, 89 S. Ct. at 1883:
>
> > 'When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.' "

And further, 456 F.2d at pp. 771-772:

> "... we do find significance in Congress' special deference toward the Court of Military Appeals where that court rules against the Government. This being so, we think that civilian courts should normally follow, without the usual independent

examination, a Court of Military Appeals ruling on an issue of jurisdiction under military law which favors the court-martial defendant."

B. Military necessity does not render the constitutional right inapplicable.

It is to be noted that the *Daigle* opinion with regard to the applicability of the Sixth Amendment is *not* grounded on the finding of an express exception or necessary implication. It is not even grounded on the argument of "military necessity", as the *Daigle* panel negates that position with this language, 490 F.2d at p. 366:

> "While the Navy argues with some vigor that naval discipline will suffer severely if appointed counsel are required, there is scant support for this in the record. The Army and Air Force already provide counsel to all accused before summary courts-martial and the Navy allows private retained counsel to participate in such proceedings.
>
> "The Navy suggests that the effectiveness of a summary court-martial as a tool for preserving discipline and order will be undermined by the participation of counsel. If so, this must already be true as to those defendants who can afford retained counsel. *Cf. Douglas v. California*, 372 U.S. 353 (1963)."

In this respect, the *Daigle* opinion agrees with that portion of Judge Duncan's concurring opinion in *Alderman*, 22 USCMA at p. 303, which holds that military necessity does *not* require rejection of applicability "of the *Argersinger* rule" to military courts:

"Beginning with the premise, as I do, that with certain exceptions criminal constitutional standards announced by the United States Supreme Court are applicable as precedent to this Court, . . . unless there is demonstrated a military necessity demanding nonapplicability, the constitutional determination reached in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), applies to criminal actions brought within the system of military justice. The record contains no evidence which convinces me that application of the *Argersinger* rule should not be followed in our system because of military necessity. Conversely, it has come to our attention that both the United States Air Force and United States Army currently apply the ruling to summary court-martial procedures. See *Henry v. Warner*, No. 73-354-DWW (CD Cal April 13, 1973)." (357 F. Supp. 495).

Further with regard to "military necessity", it should be noted that the Navy and Marine Corps have joined the Army and Air Force in complying with the requirements of the "Argersinger rule" since June, 1973, in providing assistance of counsel at summary courts-martial where confinement is to be imposed. The Navy and Marine Corps have been doing so in compliance with the ruling of *Alderman*, supra, in accordance with the holding in *United States v. Armbruster*, supra, 11 USCMA at p. 598, that decisions of the United States Court of Military Appeals "are binding upon the military." The Secretary of the Navy on June 8, 1973, issued an "ALNAV" order to all commands to conduct summary courts-martial in accordance with the holding in *Alderman*. (Message No. 082237Z/52.)

C. There is historical support for application of the constitutional right to courts-martial.

Analysis of the *Daigle* opinion leads to the conclusion that the only apparent basis for the panel's singular view as to application of the Sixth Amendment's right of counsel is its insistence on the position that "in the late 18th century the right of an accused before a court-martial to have assistance of counsel for his defense was severely limited". 490 F.2d at p. 364. For such historical analysis, the panel relied only on, and cited at p. 364, Wiener, *Courts Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1 (1958).

Not mentioned in the *Daigle* opinion, and thus apparently overlooked or ignored, is an equally scholarly historical study on the same subject one year earlier by Gordon D. Henderson (like Weiner, a Harvard Law School graduate) which reached a conclusion contrary to that of Wiener. The Henderson article, entitled *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957), declares at pp. 317-318 that prior to and since the adoption of the Sixth Amendment ". . . it was traditional to allow the accused legal assistance" at courts-martial.

The Fifth Circuit in *Betonie*, 496 F.2d at p. 1007 cites both of the Harvard Law Review articles for comparison and makes the observation that ". . . the traditional meaning of the (Sixth) amendment is not clear". As between the two articles, however, the Fifth Circuit's conclusion implicitly supports the Henderson view, with full knowledge that the Ninth Circuit panel

in *Daigle* had preferred to be swayed by the Wiener view. (The *Daigle* decision preceded that of *Betonie* and is cited in the latter opinion at p. 1007).

Since the United States Court of Military Appeals came into existence in 1951, there have been eight judges who have served with that court, including the three now serving. Only *one* of the eight has specifically agreed with the Weiner view. Six of them either have preferred the Henderson view or have decided the constitutional issue without reliance on either. The seventh, Hon. William Cook, has not had occasion to consider the question, having first taken his seat in August, 1974.

In *United States v. Culp*, supra, Judge Kilday was alone in his preference for the Wiener view, but he conceded, 14 USCMA at pp. 211-212, that there are "treatises and articles containing categorical statements to the effect that . . . 'it was traditional to allow the accused legal assistance', 'courts-martial always admit counsel for the prisoner', and others of similar import". Even the *Daigle* panel concedes, 490 F.2d at p. 363 that there *is* historical support "for the conclusion that the framers of the Bill of Rights intended the Sixth Amendment right to counsel to apply to trials before courts-martial."

It is clear, therefore, that there is no uniformity of opinion as to the "original understanding" on this constitutional provision.

D. Disputed historical documentation cannot be controlling in constitutional interpretation.

The "original understanding" of the framers of the constitution, if it is positively established by documentation beyond dispute, has been utilized by this Court in constitutional interpretation in many instances. But "original understanding" has certainly not been the *exclusive* factor, as was cogently pointed out by Prof. Jacobus tenBroek in his series of five articles in Volumes 26 and 27 of the California Law Review, 1938 and 1939, entitled "*Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*".

One of the key points emphasized by Prof. tenBroek in his study is that courts properly rely on historical data as to "original intention" only where such data is uncontroverted and established beyond doubt. This point was made by Mr. Justice Brennan in *Oregon v. Mitchell*, 400 U.S. 112 (1970), in an opinion partly concurring and partly dissenting on an issue involving interpretation of the Fourteenth Amendment, at p. 278:

> "The historical record left by the Framers . . . is thus too vague and imprecise to provide us with sure guidance in deciding the pending cases. We must therefore conclude that its Framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations. We would be remiss in our duty if, in an attempt to find certainty amidst uncertainty, we were to misread the historical record . . ."

In a similar vein, Mr. Justice Jackson pointed to the problem of contradictory "authority" in *Youngstown*

Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), at pp. 634,35:

> "A judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems . . . as they actually present themselves. Just what out forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other."

E. Modern realities must be considered in constitutional interpretation.

Even if it were undisputed that "the right of an accused before a court-martial to have assistance of counsel for his defense was severely limited" in the late 18th century, and that "there was no right to have personal, adversary counsel of the sort required in state and federal courts by *Argersinger*", (*Daigle*, 490 F.2d at p. 364), it seems clear that this Court is not bound today to assign to the Sixth Amendment a meaning limited to the time-pattern of the 18th Century.

As Chief Justice Warren declared in *Brown v. Board of Education*, 347 U.S. 483 (1954), at p. 492:

> ". . . we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."

And Mr. Justice Harlan, who was so intent on historical documentation, conceded in 1970 in *Oregon v. Mitchell*, 400 U.S. at p. 202, supra, that:

> "It must be recognized, of course, that the amending process is not the only way in which constitutional understanding alters with time. The judiciary has long been entrusted with the task of applying the Constitution in changing circumstances, and as conditions change, the Constitution in a sense changes as well."

With specific reference to current interpretation of the Sixth Amendment's guarantee of assistance of counsel, this Court said in *United States v. Wade*, 388 U.S. 218 (1966), at 224-225:

> "When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. *In recognition of these realities of modern criminal prosecution*, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings." (See Footnote No. 3, p. 224; emphasis added.)

Similarly with regard to the Sixth Amendment, this Court declared in *Williams v. Florida*, 399 U.S. 78 (1970), at pp. 102-3:

> "To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require

considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions."

See also *Mempa v. Rhay*, 389 U.S. 128, 134 (1967), and Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L.R. 181, 187-188 (1961).

Most enlightening is the following statement in the *Wiener* article, supra, 72 Harv. L. Rev. at pp. 301-302 strongly urging a position *contrary* to that of the *Daigle* panel which relied on its data:

"The present paper has demonstrated that the Founders did not intend the Bill of Rights to apply to the minuscule Army and non-existent Navy of 1789-1791, *but it does not follow* that they would have been led to a similar conclusion had they been dealing with the greatly enlarged armed forces and greatly widened military jurisdiction that are with us today." (Emphasis added; see also 72 Harv. L. Rev. at pp. 8-11, 294, and 304 on this point.)

In taking this position, Wiener was apparently guided by the now-classic statement on constitutional interpretation made by Chief Justice Hughes in *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934) at p. 442-43:

"It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the

> conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: 'We must never forget, that it is a *constitution* we are expounding' (*McCulloch v. Maryland*, 4 Wheat. 316, 407); 'a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs'. When we are dealing with the words of the Constitution, said this Court in *Missouri v. Holland*, 252 U.S. 416, 433, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters . . . The case before us must be considered in the light of our whole experience and not merely that of what was said a hundred years ago.'."

Whichever view of the "original practice" one is inclined to adopt as to assistance of counsel at military trials, it would seem that the controlling doctrine should be that expressed by the Court of Military Appeals in *United States v. Kazmierczak*, 16 USCMA 594, 599, 37 CMR 214 (1967):

> "A thick coat of tradition . . . is no assurance of constitutional acceptability."

II.

GIDEON'S AND *ARGERSINGER'S* ABSOLUTE STANDARD OF DUE PROCESS OF LAW REQUIRES ASSISTANCE OF COUNSEL IN SUMMARY COURTS-MARTIAL.

A. Summary courts-martial are criminal prosecutions by legislative and judicial definition.

The Ninth Circuit panel in *Daigle* concedes that this Court's holding in *Burns v. Wilson*, supra, necessitates its ruling that "Courts-martial are required to afford an accused due process of law". 490 F.2d at p. 364. But that panel improperly placed limitations upon the right of due process in summary courts-martial which are not required by the United States Court of Military Appeals (*Alderman*), nor by the Court of Appeals for the Fifth Circuit (*Betonie*). Further, the majority of the Ninth Circuit panel which decided the instant case made clear that it disagreed with this holding of the *Daigle* panel (though following *Daigle* "because it is the law of this Circuit"), in adding to its order by asterisk the following:

> "Judges Ely and Hufstedler disagree with the holding of *Daigle* in that both believe that, absent emergency circumstances, the due process clause requires the appointment of counsel or a counsel substitute in all summary courts, without the limitations placed upon that right by the majority of the *Daigle* panel. (App. A, Pet. for Cert., Case No. 74-175, p. 1a).

Recognizing that the *Argersinger* decision, as constituted by the "various opinions of the members of the Supreme Court", was bottomed either on the Sixth

Amendment right of an accused to be represented by counsel "or upon the Fifth Amendment right to be afforded due process of law", Judge Duncan in his concurring opinion in *Alderman*, at p. 303, did not impose any limitations to the *Argersinger* due process view in applying it to summary courts-martial. Nor did Judge Quinn in his majority opinion.

Concluding that *both* the Fifth and Sixth Amendments "require counsel in any court-martial proceeding in which incarceration is to be imposed as a punishment", the Fifth Circuit in *Betonie* declined to make any distinction between summary courts-martial and others. At pp. 1007-8, 496 F.2d, the court said:

> "Counsel for appellants argues that because the penalties imposed by a summary court-martial are minor, counsel should not be required. Nevertheless, imprisonment is a possibility, as these cases demonstrate, and *Argersinger* holds that in all such cases, counsel is required. The Navy also argues that imprisonment is not as much of a burden for military personnel as it is for civilians. However, it defies common sense to think that incarceration in a military prison is not a sufficiently serious punishment to require the presence of counsel."

The Ninth Circuit panel in *Daigle*, on the contrary, chose not to apply to summary courts-martial the absolute standard of due process mandated by *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Argersinger*, but rather a due process standard suggested by this Court's decision in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). 490 F.2d at pp. 364-65.

The analogy to *Gagnon* is made on the initial assumption that summary courts-martial, like probation and parole revocation hearings, are "situations where

confinement may be imposed, but the Sixth Amendment does not apply." 490 F.2d at p. 364. Petitioners contend that the Sixth Amendment *does* apply to summary courts-martial, for the reasons hereinbefore stated, but even if the Ninth Circuit were to be upheld in its view as to the Sixth Amendment, the *Daigle* panel's limitations on due process cannot be supported by analogy to *Gagnon*.

This is so because the analogy cannot withstand close analysis. First, probation and parole revocation hearings are *not* criminal prosecutions, whereas summary courts-martial proceedings most definitely *are*, both by legislative and judicial definition.

This Court held in *Gagnon*, 411 U.S. at p. 782, that:

> "Probation revocation, like parole revocation, is *not* a stage of a criminal prosecution . . ."

On the other hand, in *Parisi v. Davidson*, 405 U.S. 34 (1972) this Court explicity stated at p. 42 that:

> "(c)ourts-martial are . . . convened to adjudicate charges of *criminal* violations of military law . . ." (Emphasis added.)

The Manual for Court-Martial, 1969 (Rev.) treats summary court-martial specifically as a *criminal* proceeding, as likewise general and special courts-martial, in which must be applied the rules of evidence ". . . generally recognized in the trial of *criminal cases* in the United States District Courts or, when not inconsistent with those rules, at common law . . .". (Chapter XXVII, Par. 137) (Emphasis added.) Such rules do not call for "informality and flexibility" in summary courts-martial proceedings, as *Daigle* suggests. 490 F.2d at p. 365.

The Court of Military Appeals has repeatedly emphasized the criminal nature of summary court-

martial proceedings. See *United States v. Shamel*, supra. In *Alderman*, all three judges of the "Military Supreme Court" concurred in the view that summary courts-martial convictions are *criminal* convictions. Judge Quinn said: "Along with the general court-martial, [the summary and special] courts comprise the military criminal court system." 22 USCMA at p. 300. Judge Duncan, concurring and dissenting, stated that *Argersinger* applies to "criminal actions . . . within the system of military justice." Within that definition, he included summary courts-martial. *Id.* at p. 303. Judge Darden, dissenting, noted that summary courts-martial "constitute criminal convictions." *Id.* at p. 308, n. 1, See also *Manual for Courts Martial*, 1969 (Rev.) Paragraphs 8, 18(b)(1), 137.

In parole and probation hearings, the person in custody has been convicted and sentenced in a criminal proceeding long previous to the hearing on revocation. Guilt of crime there is *not* the issue. In summary courts-martial, on the contrary, the accused has *not* been convicted or sentenced previous to the current proceeding. The issue of his guilt of alleged criminal conduct has yet to be determined by due process of law. That is what characterizes summary courts-martial as "adversary, accusatory proceedings", whereas parole and probation revocation hearings are designed only to determine whether there has been a violation of conditions of parole or probation following a previous conviction and sentence in which due process was afforded.

The *Daigle* opinion apparently confuses summary courts-martial with "Article 15" proceedings. Congress specifically enacted Article 15 of the Uniform Code of

Military Justice to provide for *non-judicial* punishment. The Court of Military Appeals ruled in *United States v. Shamel*, supra, that in such proceedings the assistance of counsel is not required, as distinguished from its holding in *Alderman* that counsel is required in summary courts-martial where sentence may call for confinement.[1]

The distinction between "informal" Article 15 proceedings and summary courts-martial was clearly made by Congress in 1962, when it specifically amended Article 15 to "avoid staining military personnel's records with a *criminal* conviction." (Emphasis added). See Miller, *"A Long Look at Article 15"*, 28 Military Law Review 37 (1965), which cites on this point Senate Report No. 1911, Congressional Record, Vol. 108 (Part 6), p. 17346.

The fact that summary courts-martial are conducted with neither a jury nor a prosecutor other than the judge does not eliminate the due process requirement of assistance of counsel, as similarly it does not in civilian judicial proceedings on a charge of contempt of court. In this regard the language of Mr. Justice Holmes in *Gompers v. United States*, 233 U.S. 604, 610 (1914) is pertinent:

> "It does not follow that contempts of the class under consideration are not crimes . . . because trial

[1] In a letter dated January 11, 1973, former Secretary of Defense Melvin Laird directed secretaries of the Military Departments to revise their procedures for non-judicial punishment (Article 15) to require availability of legal advice to an accused prior to action by a commanding officer and opportunity to be accompanied at proceedings by a person who may speak for him or in his behalf.

by jury . . . has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech."

B. Consequences of summary courts-martial can be "grave".

The *Daigle* opinion deems the penalties which can be imposed by a summary court-martial as "quite restricted." 490 F.2d at p. 365. Judge Ely in the Order below (App. A, Appellants' Pet. for Cert., Case No. 74-175, p. 1a), contrarily expresses the "thought that if, under Supreme Court authority, a civilian is entitled to the assistance of an attorney in a hearing wherein the risk is no more than minimal confinement, then one in the military service of his country, *facing much graver consequences*, should be entitled to the same consideration." (Emphasis added.)

The "graver consequences" of conviction by summary court-martial include (in addition to a potential combined sentence of one month confinement and forfeiture of two-thirds of one month's pay) an *automatic* reduction in pay grade to the lowest grade of E-1, except for those above grade E-4, who may be reduced only one pay grade. A drop of *three* pay grades is thus mandatory for those in pay grade E-4. Manual for Courts-Martial (1969), Chapter IV, Par. 16(b) and Chapter XXV, Par. 126(c)(3) and (e).

Further, prior summary courts-martial convictions may be used to enhance the penalties a serviceman may

receive for a later infraction. Manual for Courts-Martial (1969), Par. 127(c). Thus, a third conviction within four years for a petty offense which would otherwise entail a maximum penalty of imprisonment for three months can result in a "bad conduct discharge . . . forfeiture of all pay and allowances, and . . . confinement at hard labor for three months". This was the basis for the *Alderman* ruling which invalidated in subsequent sentencing any consideration of a prior summary court-martial conviction in which the accused had been sentenced to confinement without assistance of counsel.[2]

C. Military personnel are no better equipped than civilians to defend themselves at trial.

Finally, the *Daigle* opinion unrealistically makes the point that because "servicemen before summary courts-martial are adults, not juveniles", they would not "ordinarily have great difficulty presenting whatever defense or mitigating circumstances they might have.". 490 F.2d at p. 365.

Petitioners submit that there is no basis for attributing greater sophistication and legal skill to a military adult than to an indigent civilian adult in determining whether "the issues are of sufficient

---

[2]With regard to the "explosive quality" of conviction by summary court-martial, see Eugene R. Fidell, *The Summary Court-Martial: A Proposal*, 8 Harvard Journal on Legislation 571, 594-605 (1971).

complexity", whether he has a defense, whether there are mitigating circumstances, or whether "the assistance of counsel is necessary adequately to present the defense or mitigating circumstances". The point is well made by the Fifth Circuit in *Betonie*, 496 F.2d at p. 1008:

> "Appellants further argue that defendants in courts-martial do not need counsel because they are thoroughly versed in the applicable law by reason of their military training, and, in addition, that most offenses tried before courts-martial are purely military, and the applicable law is much less complex than civilian law. However, this court notes that there have been many disputes about the meaning of the various provisions of the Uniform Code of Military Justice, both procedurally and substantively, and that an accused confronted with this unique system of justice is likely to need counsel as much, if not more, than his civilian counterpart. The Navy presents other arguments in an attempt to distinguish military from civilian criminal justice, but we find all of these attempted distinctions unconvincing. The fact remains that an accused entering into a court-martial faces potentially serious punishments of the type which *Argersinger* holds may not be imposed unless the accused has the assistance of counsel. We thus conclude that both the Fifth and Sixth Amendments require counsel in any court-martial proceeding in which incarceration is to be imposed as a punishment."

Similarly, the Tenth Circuit said in *Kennedy v. Commandant*, supra, 377 F.2d at p. 343:

> "Certainly no one can deny that at least the spirit of the Sixth Amendment right to counsel pervades the due process requirements of military justice."

The holding in *Daigle* is directly contrary to that of the Court of Military Appeals in *Alderman* with regard to summary courts-martial. In deference to the expertise of that court in military matters, including the nature and function of summary courts-martial, this Court should bring the Ninth Circuit in conformity with the holding of "the Supreme Court of the Military" on this issue.

D. Due process requires that a judge not serve also as prosecutor.

One of the essentials of "fundamental fairness" is the impartiality of the trier of fact. As early as 1610, in *Dr. Bonham's Case*, 8 Co. Rep. 114(a), 77 Eng. Rep. 647, it was determined that "one cannot be Judge and attorney" simultaneously. Utilizing this very basic requirement of fairness, this Court, in *Tumey v. Ohio*, 273 U.S. 510 (1927) invalidated a state procedure under which magistrate's fees were contingent upon the conviction of the accused.

The *Tumey* decision was recently reaffirmed by this Court in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Therein, the mere possibility of the existence of "a situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial", was held to "necessarily [involve] a lack of due process of law." 409 U.S. at p. 60. Due process demands that a "[P]etitioner [receive] a *neutral* and *detached judge* in the *first instance*." 409 U.S. at p. 62. (Emphasis added.)

The *Daigle* standard of due process, which sanctions a criminal proceeding in which the judge serves also as

prosecutor, and the accused, without a knowing and intelligent waiver, undergoes trial without the assistance of his own adversary counsel, surely must thus be found not to be due process at all. See *Betonie*, 496 F.2d at p. 1008.

E. District court opinion allows for military exigencies.

The *Daigle* opinion refers to situations in which "due to the exigencies of military operations, qualified counsel is not readily available" (470 F.2d at p. 365), acknowledging that no such difficulties were present in that case. The record here also shows no such fact situation, but it should be noted that the District Court's Memorandum Opinion in the instant case, 357 F.Supp. 495, 503, provided for such contingencies by "incorporating by reference" the holding of Chief Judge Pence in *Daigle v. Warner*, 348 F.Supp. 1074, 1080-81 (D.Haw. 1972) "that the type and quality of representation required under *Argersinger* must vary perforce with the context of each particular case."

See also Judge Quinn's opinion in *Alderman*, 22 USCMA at pp. 300-301, stating that "appointed counsel, under *Argersinger*, would not have to be a lawyer in the traditional sense".

F. Absolute right to counsel required under due process.

Gideon v. Wainwright, supra, overruled *Betts v. Brady*, 316 U.S. 455 (1942). In so doing this Court

negated the case-by-case due process rule of *Betts* and established that it no longer refers to "fundamental fairness" as the standard by which it determines whether an accused should be provided with counsel in a felony prosecution; this Court held that "an absolute right to appointment of counsel" applies in such case. *Mempa v. Rhay*, 389 U.S. at p. 134. *An Historical Argument for the Right to Counsel*, 73 Yale L.J. 1000, 1007 (1964). The *Gideon* rule for felony cases was made applicable by *Argersinger* to *all* criminal prosecutions which result in a sentence of confinement.

It seems clear, therefore, that the *Gideon* rationale for overruling *Betts* now also applies to all such *Argersinger*-type prosecutions. Yet the *Daigle* opinion erroneously reestablishes the defunct *Betts* case-by-case approach for summary courts-martial because they "are not felony trials". 490 F.2d at p. 366. That disregards this Court's mandate as to appointment of counsel on the basis of the Fifth Amendment's due process clause (aside from application of the Sixth Amendment) as enunciated by the combined rulings of *Gideon* and *Argersinger*.

The *Daigle* view fails to abide by this Court's holding in *Argersinger* that the constitutional right of counsel applies regardless of whether an offense is deemed a "felony" or "misdemeanor" or described as "serious" or "minor"; it seeks to revert to the distinction based on a prosecution being a "felony" trial.

III.

THE DISTRICT COURT'S JURISDICTION EXTENDED TO RESPONDENTS BEYOND ITS TERRITORIAL LIMITS UNDER THE MANDAMUS AND HABEAS CORPUS STATUTES AND COMPLIANCE WITH PROVISIONS OF 28 U.S.C. 1391(e).

A. Top military authorities are "custodians" for purposes of habeas corpus.

This Court held in *Minnesota v. Hitchcock*, 185 U.S. 373, 382 (1901) that because jurisdiction is a "preliminary question",

> "It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law".

See also *Ex parte Schollenberger*, 96 U.S. 369, 377 (1877); *Reid v. United States*, 211 U.S. 529, 539 (1908); *Mercelis v. Wilson*, 235 U.S. 579, 583 (1915); and *Industrial Addition Ass'n v. Co. . of Internal Revenue*, 323 U.S. 310, 313 (1945).

Accordingly, it is necessary to determine whether the district court in the instant case, even if its judgment and orders otherwise are affirmed by this Court, had appropriate jurisdiction to make them effective as against these respondents.

It is to be noted that the question of the district court's jurisdiction was raised by the Fifth Circuit in *Betonie*, 496 F.2d at p. 1005, and found to exist under the "general habeas corpus statute", but as that suit was not a class action, the appellate court could find

"no justification for the broad-based order of the district court establishing a procedural framework for *all* summary courts-martial". (496 F.2d at p. 1008, emphasis added.)

In *Daigle* and in the instant case, the respective district courts found jurisdiction for their judgments and orders under the provisions of both the mandamus statute (28 U.S.C. §1361) and the habeas corpus statute (28 U.S.C. §2241 et seq.). 348 F.Supp. at p. 1078 and 357 F.Supp. at p. 500. The Ninth Circuit *Daigle* panel did not refute the jurisdiction of the Hawaiian district court and in fact ordered it to conduct further habeas corpus proceedings as to one of the petitioners. 490 F.2d at p. 366.

In ordering vacated the orders and judgment of the district court, the Ninth Circuit panel in the instant case remanded the cause to the district court "for reconsideration in the light of *Daigle*". (App. A, Pet. for Cert. Case No. 74-175, p. 1a). However, on the question of jurisdiction, this case cannot properly be considered "in the light of *Daigle*" as the Hawaii and California district courts exercised their respective jurisdictions at different levels, so that the issue of jurisdiction in the two cases is *not* the same.

The district court in *Daigle* limited the scope of its judgment and order to its own territorial jurisdiction, as did the district court in *Betonie*. It may be assumed therefore that the "custodians" of petitioners for habeas corpus purposes in both *Daigle* and *Betonie*, whether the latter were named petitioners or members of a petitioner class, were those named respondents who resided in the respective jurisdictions of the Hawaii and Florida district courts. For that reason there was

no basis for raising the question in either of those cases whether the top Navy and Marine Corps authorities residing in Washington, D.C. may properly be treated as "custodian" for purposes of habeas corpus jurisdiction.

That question *has* been raised, however, in the instant case. Here the district court held that ". . . this Court's jurisdiction extends beyond this district in terms of the effect this ruling must have upon military personnel in the Navy and Marine Corps and in the custody of Warner, Zumwalt and Cushman". 357 F.Supp. at pp. 500-501. (The latter, all residents of Washington, D.C. were then respectively Secretary of the Navy, Chief of Naval Operations, and Commandant of the Marine Corps.) Further, that court held at p. 502 that ". . . Respondents-Defendants Warner, Zumwalt, and Cushman are the *custodians* of the class herein described for the purpose of the writ of habeas corpus". (Emphasis added.)

Respondents contended below that the district court was without jurisdiction to extend the scope of its judgment and orders beyond the territorial limits of the Central District of California.

Petitioners maintain that the district court correctly established the basis of its jurisdiction to extend the scope of its judgment and orders beyond the territorial boundaries of the Central District of California, *both* for purposes of mandamus and issuance of a writ of habeas corpus by virtue of the provisions of 28 U.S.C. §1391(e). 357 F.Supp. at pp. 500-502.

In further support of the position of that court that the top officials of a military authority are custodians of all military personnel under their command for the purpose of habeas corpus jurisdiction, and that such

officials need not be physically within the district court's territorial limits for said jurisdictional purposes; the Ninth Circuit case of *Smith v. Campbell*, 450 F.2d 829 (1971) is pertinent.

In *Smith*, petitioner and his custodian, his immediate commanding officer, were within the territorial jurisdiction of the California district court at the time the petition for writ of habeas corpus was filed. Prior to court action, petitioner was involuntarily removed to Australia. His new immediate commanding officer in Australia was not within the California court's territorial jurisdiction, but the petition had named as respondents the Secretary of Defense, the Secretary of the Navy, and the Chief of Naval Personnel. The Ninth Circuit held that the latter top officials in Washington, D.C. were "those having present custody of the petitioner" and that they "are subject to the process of the court". (450 F.2d at p. 834.) That Court said at p. 833:

> "Generally, a 'superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him'. *Williams v. Fanning* 332 U.S. 490, 493, 68 S.Ct. 188, 189, 92 L.Ed. 95 (1947). In *Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868 (1955), the Court stressed the requirement that in this area the courts give effect to practical considerations rather than formalistic and technical concepts. Furthermore, habeas corpus 'is not now and never has been a static, narrow, formalistic remedy'. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)."

With regard to obtaining jurisdiction over the Washington officials, the Court stated further in *Smith*, 450 F.2d at pp. 833-834:

> "In order to obtain jurisdiction over indispensable federal officials who are outside the territorial jurisdiction of the district court, the court may utilize the provisions of 28 U.S.C. §1391(e), which provides that process may be served by certified mail beyond the territorial limits of the district. In *Schlanger v. Seamans*, 401 U.S. 487 (1971) n. 4 at 490, 91 S.Ct. 995, the Court held that the extraterritorial service of process provisions of §1391(e) could not be used to create jurisdiction when it did not exist at the time of the filing of the action. However, the Court did not suggest that once jurisdiction to consider the merits of a habeas corpus petition is first properly established, §1391(e) could not be used to join indispensable parties."

The latter quotation from *Smith* was cited with approval by Judge Wright of the Ninth Circuit in *Miller v. Laird*, 464 F.2d 533, 534 (1972).

The holding of *Smith* applies to the instant case in that the named petitioners conferred jurisdiction on the District Court over their immediate commanding officers in California by personal service. 357 F.Supp. at p. 501. They also named as respondents the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps, and served them with process in Washington, D.C. under the provisions of §1391(e). 357 F.Supp. at p. 501. The court's jurisdiction having been established by personal service on the immediate commanding officers who were within the court's territorial jurisdiction, §1391(e)

could properly be used to join as "indispensable parties" the Washington officials as custodians of the members of petitioners' class. The district court properly so held them to be.

Holding that the phrase "civil actions" in §1391(e) "should be read to include habeas corpus actions", on the basis of the Supreme Court's statement in *Harris v. Nelson*, 394 U.S. 286, 293 (1969) that "It is, of course, true that habeas corpus proceedings are characterized as 'civil' ". the court in *United States ex rel Armstrong v. Wheeler*, 321 F.Supp. 471 (E.D.Pa. 1970), presented an illuminating Footnote No. 8 at p. 477:

> "We have neither found in our research nor have been referred to any cases other than *Switkes* which even discuss the relation between 'civil action' as it is used in section 1391 and habeas corpus. The *Harris* case dealt with the interpretation of Federal Rule of Civil Procedure 81(a)(2) as it related to the application of Rule 33 discovery in habeas corpus proceedings.
>
> "It would appear that Congress seemed to be most concerned with mandamus proceedings when it passed Sections 1361 and 1391 together in 1962, cf. S. Rep. No. 1992, 87th Cong. 2d Sess. (1962). However, this concern was motivated by the more emcompassing purpose to remove procedural obstacles to suits against centralized governmental officials. Id. Since the custodian in habeas corpus actions is almost always within the same district as the petitioner, it is logical that the Congress would not directly consider such actions when addressing itself to the problem of such procedural obstacles. To rule that habeas corpus did not come within the scope of this statute *would solidify procedural obstacles to suits against central administrators, which obstacles Congress had clearly indicated were undesirable.*" (Emphasis added)

The Second Circuit also holds that "Since habeas corpus proceedings are civil in nature, they are subsumed under the phrase 'any civil action' ". *United States ex rel. Meadows v. State of New York*, 426 F.2d 1176 (1970), Footnote No. 9, p. 1183, which cites *Webb v. Beto*, 362 F.2d 105 (*5th* Cir. 1966).

It is significant to note that the Navy in *Smith*, 450 F.2d at p. 834, contended that the top military officials in Washington, D.C. *could properly be deemed the "custodians"* of petitioner in Australia if only he would file a new petition in the District of Columbia. They cited *Eisentrager v. Forrestal*, 174 F.2d 961 (1949). See Footnote No. 1, 450 F.2d at p. 834, which points out that in this Court it is still an open question whether a "custodian" for purposes of habeas corpus may be an official who has "directive power over the immediate jailer". See also 357 F.Supp. at p. 501, with reference to *Strait v. Laird*, 406 U.S. 341 (1972), and p. 502, with reference to *Burns v. Wilson*, 346 U.S. 844 (1953).

This court implicitly may have answered that question in the affirmative in *Braden v. Circuit Court*, 410 U.S. 484 (1973), 93 S.Ct. 1123, 1131 (1973), where the opinion of Mr. Justice Frankfurter in *Burns v. Wilson*, 346 U.S. 844, 851-852, is cited. Affirmation of the district court's judgment and orders in the instant case on the basis of jurisdiction grounded not only in mandamus but also in habeas corpus will confirm that view.

CONCLUSION

The order of the appellate court vacating the judgment and orders of the district court should be vacated, and judgment rendered affirming the judgment and orders of the district court.

December 2, 1974.

Respectfully submitted,

NATHAN R. ZAHM
4422 Sherman Oaks Circle
Sherman Oaks, California 91403
A.L. WIRIN and FRED OKRAND
A.C.L.U. Foundation of Southern California
633 South Shatto Place
Los Angeles, California 90005

Attorneys for Petitioner

Of Counsel:
DAVID F. ADDLESTONE

APPENDIX A

Manual for Courts-Martial, 1969 (Rev.) – Chapter XIV

79. SUMMARY COURTS-MARTIAL. ***a. Function.*** The function of a summary court-martial is to exercise justice promptly for relatively minor offenses under a simple form of procedure. The summary court will thoroughly and impartially inquire into both sides of the matter and will assure that the interests of both the Government and the accused are safeguarded. Unless otherwise stated herein or in regulations of the Secretary of a Department, the procedure prescribed for a general court-martial will, when applicable, serve as a guide for a summary court-martial. See appendix 8*b* in this connection. See also 137.

b. Power to obtain evidence. A summary court has the same power as the trial counsel of a general or special court-martial to compel the attendance of civilian witnesses by subpoena (115; Art. 46) and to take depositions in proper cases (117; Art. 49). To obtain the attendance of witnesses, the summary court will take action similar to that taken by the trial counsel of a general or special court-martial. In this connection, see 44*f*(2).

c. Examination of file. When charges are referred to a summary court-martial, the court will carefully examine the charges and allied papers to see that the charges are in proper form and that the data on the charge sheet and any evidence of previous convictions are complete and free from error of substance or form.

The summary court will report to the convening authority any substantial irregularity in the charges or accompanying papers. Ordinarily, the court will correct and initial slight errors or obvious mistakes in the charges, but if substantial changes are required, the court will refer the matter to the convening authority. See 33*d*.

d. Trial procedure. (1) *Determining jurisdiction.* After determining that the charges and other data are in proper form, the summary court should arrange for the presence of the accused. When the accused appears, the court should advise him of the following matters: the general nature of the charges; the fact that they have been referred to a summary court-martial for trial; who convened the court; the name of the accuser; the names of the witnesses who will probably be called; the right of the accused to cross-examine them or have the court ask any questions which the accused desires answered; the right of the accused to call any witnesses or produce any evidence in his own behalf with the assurance that the court will assist him in every possible way to do so; his right to testify on the merits or to remain silent (148*e*; app. 8*a*; Art. 31) and, after any findings of guilty are announced, to make an unsworn statement in mitigation or extenuation of any offense of which he may be convicted (75*c*; app. 8*a*); the maximum sentence which the court can adjudge if the accused is found guilty of the offense or offenses charged.

The summary court will also advise him of his right to object to trial by summary court-martial (Art. 20) and will ask him whether he consents or objects to trial. After giving the accused a reasonable time to

consider the question, the summary court will record his response in the space provided on the charge sheet. If the accused objects to trial, the summary court will note those facts on the charge sheet and will return the charges and allied papers to the convening authority. If the accused consents to trial, the summary court will proceed with the trial.

(2) *Arraignment and pleas.* After complying with the provisions of the preceding paragraph (79*d*(1)) and determining that it has jurisdiction over the accused, the summary court will read or show the charges and specifications to the accused. Any necessary explanation of the charges may be made. The accused should then be asked how he pleads to each specification and charge.

If the accused pleads guilty to any specification or charge, the summary court should explain to him the meaning and effect of the plea. This explanation should include the following:

The elements of the offense to which the plea of guilty relates;

That, as to the offense to which the plea of guilty relates, the plea admits every element charged and every act or omission alleged and authorizes conviction of the offense without further proof;

The maximum authorized punishment which may be adjudged upon conviction; and

That the maximum authorized punishment may be adjudged upon conviction of the offense. See 70*b*(2).

A plea of guilty will not be accepted unless the summary court-martial after questioning the accused is satisfied not only that the accused understands the meaning and effect of his plea and admits the

allegations to which he has pleaded guilty but also that he is voluntarily pleading guilty because he is convinced that he is in fact guilty. See 70*b*(3).

If the accused desires to change his plea, or if the summary court is in doubt as to his understanding and desire to plead guilty, or if at any time during the trial the accused makes a statement, sworn or unsworn, inconsistent with his plea of guilty, a plea of not guilty will be entered. If a plea of guilty to all specifications and charges is allowed to stand, the court may proceed at once to find the accused guilty. However, the court may, in the interest of justice, proceed with the trial and consider evidence on the merits. If, after hearing evidence on the merits, the court believes the plea of guilty to have been improvidently entered, it shall enter a plea of not guilty and proceed as though the accused had pleaded not guilty. See 70 and Article 45.

(3) *Presentation of evidence.* If the accused has pleaded not guilty or if following a plea of guilty evidence on the merits or in extenuation or mitigation is to be received, arrangements will be made for the attendance of necessary witnesses. Witnesses should be excluded from the courtroom until called to testify. Witnesses for the prosecution will be called first and examined under oath as to all matters relevant to the offense charged. The accused will be extended the right to cross-examine these witnesses. The summary court will aid the accused in the cross-examination, and, if the accused desires, will ask questions suggested by the accused. On behalf of the accused, the court will obtain such other evidence as may tend to disprove or negative guilt of the charges, explain the acts or omissions charged, show extenuating circumstances, or establish

grounds for mitigation. Before determining the findings, he will explain to the accused his right to testify on the merits or to remain silent and will give the accussed full opportunity to exercise his election. See appendix 8*b* for form of explanation.

(4) *Findings and sentence.* The applicable principles stated in 74 and 76 should be considered by a summary court-martial in determining the findings and sentence, respectively. The court will announce the findings to the accused as soon as they are determined. If the accused has been found guilty of any offense, the summary court will advise him of his right to submit matter in extenuation or mitigation, including the making of an unsworn statement (75*c;* app. 8). Before determining the sentence, the summary court will show or read to the accused any admissible evidence of previous convictions (75*b*(2)) and the personal data appearing on the charge sheet and will ask him whether they are correct. If the accused claims they are not correct in any particular, the court will determine the issue (75*b*(1), (2)). The court will advise the accused of the sentence as soon as it is determined. If the sentence includes confinement, the summary court will take such action as may be prescribed by the convening authority to have the accused delivered to an appropriate place of confinement. The court will also advise the accused of his right to apply to the convening authority for deferment of service of the confinement. See 88*f*.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5176

DANIEL EDWARD HENRY, *et al.*, etc.,

Petitioners,

v.

HONORABLE J. WILLIAM MIDDENDORF, II, etc., *et al.*,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 1974, a copy of Brief for Petitioners was airmailed, postage prepaid, to Hon. Robert H. Bork, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, Counsel for the Respondents. I further certify that all parties required to be served have been served.

NATHAN R. ZAHM
4422 Sherman Oaks Circle
Sherman Oaks, California 91403

Counsel for Petitioners